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No. ——

In the Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES OF AMERICA, APPELLANT

v.

HORACE JOHNSON, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

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OPINION BELOW

The opinion of the United States District Court for the Northern District of Georgia (Appendix A, *infra*, pp. 15–19) is not yet reported.

JURISDICTION

The judgment of the district court dismissing the indictment against appellees was entered on May 15, 1967. A notice of appeal to this Court was filed on June 13, 1967. The jurisdiction of this Court to review the decision of the district court on direct appeal is conferred by 18 U.S.C. 3731. Cf. *United States* v. *Guest*, 383 U.S. 745.

STATUTORY PROVISIONS INVOLVED

Section 241 of the Criminal Code (18 U.S.C. 241) provides:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—
>
> They shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

Section 201(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000a(a)) provides:

> All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

Section 207(b) of the Civil Rights Act of 1964 (42 U.S.C. 2000a–6(b)):

> The remedies provided in this title shall be the exclusive means of enforcing the rights based on this title, but nothing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent

> with this title, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right.

Other pertinent provisions of Title II of the Civil Rights Act of 1964 (42 U.S.C. 2000a *et seq.*) are reproduced in Appendix B, *infra,* pp. 21–22.

QUESTION PRESENTED

Whether 18 U.S.C. 241 reaches at least some conspiracies to interfere with the exercise of rights secured by Title II of the Civil Rights Act of 1964, relating to equal treatment in places of public accommodation without regard to race.

STATEMENT

On February 16, 1967, the United States Grand Jury for the Northern District of Georgia, Atlanta Division, returned an indictment charging four individuals with engaging in a criminal conspiracy in violation of 18 U.S.C. 241. The object of the conspiracy was alleged to be:

> * * * to injure, oppress, threaten, and intimidate Lester Hester, James Garland Sheats, and John Lewis Smith, Negro citizens of the United States, as well as other Negro citizens of the United States, in the free exercise and enjoyment by said Negro citizens of the right and privilege, secured to them by the laws of the United States, to the full and equal enjoyment of the goods, services, facilities, privileges, ad-

U.S. 787, 800–801. Even under a restrictive view of its scope, therefore, Section 241 would seem to reach a private conspiracy directed against the right to nondiscriminatory treatment in places of public accommodation. The question, then, is whether Congress deliberately foreclosed the sanction that Section 241 would otherwise afford by providing in Title II that the rights there created be enforced only by equitable proceedings.[2]

This contention is based on a narrowly literal reading of the language Section 207(b) (42 U.S.C. 2000a–6(b)), which declares, in part: "The remedies provided in this title [*i.e.*, injunctive relief] shall be the exclusive means of enforcing the rights based on this title * * * ." It is beyond doubt that Section 207(b) bars both damage suits and criminal prosecutions in some situations. As Senator Humphrey noted in the congressional debates, a restaurant owner denying service in the erroneous belief that his place of business is not covered by Title II was not meant to be subjected to criminal prosecution under 18 U.S.C. 241

[2] This issue was presented to this Court in *United States* v. *Guest*, 383 U.S. 745, 749–752, but it was not reached in that case because the district court's judgment dismissing the public accommodations count of the indictment there was "based, at least alternatively, upon its determination that this paragraph was defective as a matter of pleading." 383 U.S. at 751. This Court held that review of this part of the indictment was precluded by settled construction of the Criminal Appeals Act, 18 U.S.C. 3731, relying on *United States* v. *Borden Co.*, 308 U.S. 188 (383 U.S. at 751–752). In the present case, however, the district court's dismissal of the indictment was based entirely on a construction of the statute under which the indictment was brought, against the background of the exclusive-remedy provision of Title II.

or 242. 110 Cong. Rec. 9767. It may also be assumed that, because of Section 207(b), a group of restaurant operators or their agents could not be prosecuted under Section 241 for a nonviolent conspiracy to deny service to Negroes. Cf. *United States* v. *Mosley*, 238 U.S. 383.

However, the exclusive-remedy provision in the public accommodations law hardly compels the conclusion that those who engage in a conspiracy accompanied by violence designed to terrorize Negroes so that they will not even attempt to assert their right to service at places of public accommodation plainly covered by Title II are likewise immunized from the federal criminal laws. Such a result would be so startling that a congressional purpose to provide such protection to conspirators cannot be imputed. Although the legislative history of Title II's exclusive-remedy provision plainly indicates an intention to exempt proprietors of places of public accommodation—at least in the absence of violence—from criminal sanctions and civil damages,[3] no such intent appears with respect to the acts of racially motivated terrorists. The reasons for exempting the proprietor and his agents from such sanctions are wholly inapplicable to acts of violent, third-party conspirators.

Congress recognized that voluntary desegregation by white businessmen was not generally to be anticipated, at least initially, in light of the combined

[3] See, *e.g.*, the legislative history cited by the court below (App. A, *infra*, pp. 18–19).

pressures of competition and community sentiment.[4] Trying to foster general acceptance of, and to ensure widespread voluntary compliance with, the new law, Congress sought to apply only as much leverage as it felt was needed to overcome these obstacles. Aware that many proprietors felt compelled, for economic reasons, to operate segregated facilities, Congress determined to withdraw certain criminal sanctions where they might appear to be too harsh and where they would not, in any event, be instrumental in accomplishing the basic congressional purpose—desegregation of places of public accommodations. An injunction against the proprietor will usually be more effective than a criminal prosecution, because a criminal conviction will not necessarily assure Negroes nondiscriminatory service in the future. Injunctive relief, supported by the threat of contempt sanctions for violations, is more likely to achieve that result.

On the other hand, there is no reason to accord terrorists, unconnected with any establishment, the benefit of Title II's quite explicable exemption. Unlike the owner of a particular restaurant or theater who merely fails to accord nondiscriminatory service, they are engaged in threats, intimidation and reprisal—dangerous and violent conduct.[5] They act

[4] See Hearings Before the Senate Committee on Commerce on S. 1732, 88th Cong., 1st Sess., Pt. 1, at 206 (testimony of Assistant Attorney General Marshall); *id.* at 324 (statement of Hon. Frank H. Morris); *id.*, Pt. 2, at 690 (testimony of Undersecretary of Commerce Roosevelt); 110 Cong. Rec. 9765–9767 (remarks of Senator Humphrey).

[5] It is true that Sections 203 and 204 of the Civil Rights Act of 1964 (42 U.S.C. 2000a–2, 2000a–3) provide for injunctive re-

from malice rather than in response to community pressure or because of fear of economic loss. Their actions cannot be said to stem from honest doubts about the coverage of Title II, or from practical difficulties in complying with its requirements.

The text of the statute does not foreclose such a line of distinction. Indeed, Section 207(b) merely states that the remedies provided in Title II shall be the exclusive means of "enforcing" rights based on the title. It is reasonable to construe the word "enforcing" to encompass only those remedies that would compel a proprietor to *render service* to all on an equal basis—without attributing to Congress an intention to displace other statutory means of deterring or punishing persons who forcibly interfere with those seeking

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lief against those who "intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or * * * punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202." And Section 206 of Title II (42 U.S.C. 2000a–5) establishes the right of the Attorney General to bring a civil action for injunctive relief whenever he has cause to believe that persons are engaged in a "pattern or practice of resistance to the full enjoyment of any of the rights secured" by Title II. But these provisions do not provide for the vindication of the community's interest in the redress of criminal wrongs. Furthermore, the Attorney General's power to litigate is limited to instances where a "pattern or practice" of resistance exists. The government, under Title II read alone, would be powerless to protect its citizens from isolated acts of violence not constituting a pattern or practice, even where, as here, such violent acts are directed against persons seeking to exercise federally-protected rights. It can fairly be said, then, that as to isolated acts of violence, Title II offers the government no remedy at all.

to obtain (or render) such service, like the criminal sanctions of Section 241.[6]

Courts have long recognized such a distinction. This Court has defined the difference in these terms:

> The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual, according to the familiar classification of Blackstone: "Wrongs are divisible into two sorts of species: *private wrongs* and *public wrongs*. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed *civil injuries:* the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of *crimes* and *misdemeanors.*" [Mr. Justice Gray, citing 3 Bl. Comm. 2 in *Huntington* v. *Attrill,* 146 U.S. 657, 668–669.]

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[6] Section 204 of Title II (42 U.S.C. 2000a–3) provides that a civil action may be brought seeking "preventive relief" whenever any person has engaged in any act or practice prohibited by Section 203. Section 203 contains Title II's prohibitions on intimidation and coercion. But Section 204(d) also contains a proviso permitting the court to "refer the matter to the Community Relations Service * * * for as long as the court believes there is a reasonable possibility of obtaining voluntary compliance * * *," up to 120 days. If Congress had intended Section 204 to be a substitute for criminal sanctions against violent conspiracies by persons unconnected with a place of public accommodation, it is doubtful that its enforcement statute would have been written in terms of "obtaining voluntary compliance."

Title II sets out equitable "remedies" under which an aggrieved person may secure his right to equal service at places of public accommodation. Those remedies are, as Section 207(b) makes clear, the exclusive means by which the aggrieved person may redress the "private wrong" committed against him. But penal statutes, such as 18 U.S.C. 241, impose punishment, in the name of the sovereign, for "public wrongs" which, in Blackstone's words, "are a breach and violation of public rights and duties" (3 Bl. Comm. 2). The purpose of prosecution under Section 241 is not to enforce the right of the aggrieved party to equal access to a place of public accommodation, but rather to protect and vindicate the rights of the whole community. Section 241 is not directed so much toward providing a *remedy* for the aggrieved, as toward prescribing *punishment* for the alleged wrongdoers.

Section 207(b) and its legislative history indicate that Congress intended to limit the *kinds* of conduct which would be considered offenses against the Nation. Refusals of service, without more, were not to be so considered. But the exclusive-remedy provision of Section 207(b) does not require the narrow construction given Section 241 by the district court, particularly in light of the broad protection which Section 241 has traditionally been regarded as affording. In discussing the reach and scope of Section 241 in *United States* v. *Price,* 383 U.S. 787, 800–801, this Court indicated its agreement with the words of Mr.

Justice Holmes in *United States* v. *Mosley*, 238 U.S. 383, 387–388, when he said:

> The source of this section in the doings of the Ku Klux and the like is obvious and acts of violence obviously were in the mind of Congress. Naturally Congress put forth all its powers. * * * [T]his section dealt with Federal rights and with all Federal rights, and protected them in the lump * * *. [It should not be construed so] as to deprive citizens of the United States of the general protection which on its face § 19 [now Section 241] most reasonably affords.'

The Civil Rights Act of 1964 created a new federal right to nondiscriminatory treatment in places of public accommodation and provided for its direct enforcement by injunction. Congress, to be sure, declined to make it a crime to peaceably deny that right. Title II's provisions, however, should not be construed as wholly suspending the general law punishing violent conspiracies directed against the assertion of federal rights. Section 207(b)'s exclusive-remedy provision, properly considered, was simply not intended to accomplish such a result.

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[1] Mr. Justice Fortas, speaking for the Court in *Price*, added to the words of Justice Holmes (383 U.S. at 801):

> We think that history leaves no doubt that, if we are to give Section 241 the scope that its origins dictate, we must accord it a sweep as broad as its language.

CONCLUSION

For the foregoing reasons, we respectfully submit that probable jurisdiction should be noted and the case set down for plenary consideration.

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